Supreme Court, U.S.
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Supreme Court of the United States

CHARLES L. GRIMES and JANE GILLESPIE GRIMES,
Petitioners,

v.

NORTHWEST AIRLINES, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Warsaw Convention, the treaty concerning actions against airlines by international passengers, deals in Article 17 with "accidents," and in Article 25 with airlines' "willful misconduct."

1. In *Air France* v. *Saks*, 470 U.S. 392, 404-406 (1985), this Court defined an "accident" under Article 17 as "an unexpected or unusual event or happening that is external to the passenger," admonishing that "this definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries," that it "requires only that the passenger be able to prove that some link in the chain was an unusual or unexpected event external to the passenger," and that it is "for the trier of fact to determine whether an 'accident' as here defined caused the passenger's injuries."

The "event or happening" giving rise to this suit was the arrest and forcible removal of a passenger sitting quietly in the seat to which he had concededly been assigned. Did the court below violate *Saks* by holding that there was no "accident," based on its own stated view that the broad overall general category of "confusion about seat assignments" and "removal of bumptious [*sic*] passengers" was not "unexpected or unusual," without analyzing the elements of the specific occurrence or referring to the (clearly contrary) evidence of record?

This perception of the *Saks* requirements by the court below is inconsistent with a recent dictum of this Court in *El Al Israel Airlines, Ltd.* v. *Tseng*, 119 S. Ct. 662, 670 n.9 (1999), and with the Eleventh Circuit's

decision in *Krys* v.*Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998).

2. Under the applicable version of Article 25, a carrier "shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his willful misconduct . . . ." Did the court below err in holding that Article 25 applies only when there is an "accident" under Article 17?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties.

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PETTITION FOR WRIT OF CERTIORARI

Charles L. Grimes ("Grimes") and Jane Gillespie Grimes ("Jane Grimes") (collectively "the Grimeses") respectfully petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

I. Preliminary

A. Reports of Opinions and Orders in the Case

The opinion of the court below is unreported. It is reproduced in the Appendix at 1a-7a. Opinions of the court of first instance, the United States District Court for the Eastern District of Pennsylvania, are reported at 1999 WL 562244 (E.D.Pa.) (reproduced at 8a-15a) and 1999 WL 527831 (E.D.Pa.) (reproduced at 16a-18a).

B. Basis for Jurisdiction in This Court

The judgment of the court below was entered on May 4, 2000. 6a-7a. This Court has jurisdiction to review the judgment in question on a writ of certiorari under 28 U.S.C § 1254(1).

C. Treaties Involved in the Case

Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929 ("the Warsaw Convention"), 49 STAT. 3000, T.S. No. 876 (1934), note following 49 U.S.C. App. § 1502:

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his willful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to willful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

The full text of the Convention will be found in the Appendix at 25a-41a.[1]

II. Statement of the Case

1. The court of first instance was the United States District Court for the Eastern District of Pennsylvania. That court had jurisdiction under 28 U.S.C. § 1332 (diversity of citizenship) and/or 28 U.S.C. § 1331 (actions arising under treaties of the United States).

2. Over the past 15 years this Court has decided a series of cases that clarify application of the Warsaw Convention, including *Air France* v. *Saks*, 470 U.S. 392 (1985) (definition of "accident" under Article 17); *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530 (1991) (no recovery under Article 17 solely for mental or psychic injuries absent bodily injury); *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217 (1996) (cognizability of harm under Article 17 is determined by domestic law); and *El Al Israel Airlines, Ltd.* v. *Tseng*, 119 S. Ct. 662 (1999) (ousting of state law remedies by Article 17). This case presents issues that were discussed last year in *El Al* but could not there be decided because of stipulations by the parties, *viz.*, application of the *Saks* definition of "accident," and the relationship between Article 17 and Article 25.

3. On August 13, 1998, the Grimeses were passengers on an international flight of the respondent Northwest

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[1] The quoted text of Article 25 was in effect as of the date of the occurrence giving rise to this suit, August 13, 1998. Article 25 was subsequently amended by Montreal Protocol No. 4, effective in the United States from March 4, 1999. Its text appears at 42a.

Airlines from Detroit to Philadelphia.[2] Well in advance of the flight, Grimes, who was 63 years old, advised Northwest that he had a physical need for maximum legroom and requested a seat on an exit row. Such a seat reservation was duly issued to him and was reconfirmed. He arrived early for the flight departure, and Northwest personnel checked and verified his seat assignment and duly seated him.

Another passenger then arrived, saying that she had been issued a reservation for the same seat. She did not press the issue, however, and quietly took another seat, one of many empty seats on the plane. However, a truculent and belligerent employee of Northwest, one Leone, nevertheless demanded that Grimes get off the plane. He declined to do so. Leone became enraged, snatched Grimes's boarding pass, and made other offensive moves, including physical contact. When Grimes still declined to leave the airplane, the airport police, at the instigation and direction of Leone and the captain of the aircraft (whose information about the matter was limited solely to whatever Leone told him), arrested Grimes and removed him from the plane.

Though they had been advised of his physical problems, the police yanked at Grimes's arms while he was still belted in his seat, injuring him in front of Leone, other passengers, and his wife. They jerked him out of his seat in handcuffs, slammed him against the gangway wall, twisted his arm up behind his back, tried to throw him on the floor, and threatened him with pepper spray.

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[2] The flight was from Vancouver, B.C., to Philadelphia, with an overnight layover and change of planes in Detroit; the incidents in question took place in the Detroit airport in the boarding process for the Detroit-Philadelphia leg. This qualifies as an international flight under the Warsaw Convention.

He sustained bruises and nerve damage to both wrists, a badly sprained right ankle, and injuries to his left ankle, neck, right shoulder, and right arm; and was unable to travel on his regular business for an extended period.

4. The Grimeses brought suit against Northwest in the United States District Court for the Eastern District of Pennsylvania, setting forth claims for personal injuries resulting from, *inter alia*, false imprisonment, assault, defamation, and intentional infliction of emotional distress. Compensatory and punitive damages were claimed. Trial by jury was demanded.

5. On deposition, the captain of the plane and two flight attendants testified that removal of a passenger was a rare occurrence. The captain, a veteran pilot, testified that he had had occasion to order removal of a person from an aircraft only seven times in his 28 years' experience. APP0800, APP0864.[3] Neither flight attendant, with eight and six years' experience respectively, had ever witnessed the removal of a passenger from an airplane. APP1193-4, APP1291.

On deposition, the arresting detective sergeant testified that Grimes's demeanor was "matter of fact" rather than bumptious. "[N]othing overly aggressively loud. Just a matter of fact, nope, I'm not going." APP0347, APP0388.

6. The district court dismissed the claim for punitive damages, holding that the action was one under the Warsaw Convention and that punitive damages are not awarded in such actions. 19a-24a. It granted a motion *in limine* precluding, as speculative, any offer of evidence as to Grimes's financial losses resulting from his inability

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[3] "APP" citations are to the Joint Appendix in the court below.

to travel by reason of his injuries. 16a-18a. Finally, it granted a motion for summary judgment in Northwest's favor. 8a-15a.

In granting summary judgment, the district court held, first, that the Grimeses could sue only under the Warsaw Convention and not under state law. It held, second, that only Article 17 of the Convention was implicated and not Article 25, on the ground that there was no evidence that Northwest's employees had committed willful misconduct (thus disregarding whether the jury could have inferred such an intent from the evidence). Third, it dismissed Jane Grimes's claim for emotional injuries on the ground that compensation for such injuries cannot be recovered under Article 17. Fourth, it held that Grimes's injuries were not caused by an "accident" under the Warsaw Convention. Evidently considering that the injuries were caused by "an argument over seating" rather than by the belligerent behavior of the airline personnel and the police, it held that "an argument over seating is neither unexpected nor unusual," and that the injuries Grimes suffered were his own fault because "it was entirely within Grimes's control whether he was arrested." 12a-15a.

7. On appeal, the Third Circuit did not address or follow this last reasoning. Instead, it simply said that the injuries complained of "did not come about as the result of an 'accident,' as that term is used in the Warsaw Convention," because "confusion about seat assignments is hardly unexpected or unusual. Nor is the removal of bumptious passengers from planes." Hence, there was no liability under Article 17. 4a. As for Article 25, it held that "[o]nly after one has established that an accident occurred can one attempt to demonstrate that the accident came about as a result of willful misconduct, in

which case one can benefit from the provisions of Article 25." 4a n.3. It accordingly did not address Article 25 further, simply saying generally that "[a]s Mr. and Mrs. Grimes are barred from recovering at all under the Warsaw Convention, we do not need to reach the question of whether the District Court was correct to bar Mr. and Mrs. Grimes from seeking emotional damages and consequential damages under their claims." 5a.

III. Reasons for Allowance of the Writ

A. The Case Involves Issues of Substantial General Importance Affecting Millions of International Air Passengers.

With exceptions under Article 25 discussed *infra*, the Warsaw Convention preempts state law actions by international passengers against air carriers, so that all such actions must be brought under the Convention, *El Al Israel Airlines, Ltd.* v. *Tseng*, 119 S. Ct. 662 (1999); and the Convention generally provides for less redress to passengers than would actions under state law. Huge numbers of people are affected. In 1994, the most recent year for which the Department of Transportation has published figures, nearly 97 million passengers traveled by air between the United States and the rest of the world. U.S. INTERNATIONAL AIR PASSENGER AND FREIGHT STATISTICS CALENDAR YEAR 1994, www.bts.gov/oai/international/calyr94.htm. The Commerce Department forecasts nearly 26 million visitors to the United States from overseas for 2000 and over 30 million for 2003, CHART #1 FORECAST OF INTERNATIONAL TRAVEL TO THE UNITED STATES (ESTIMATES IN THOUSANDS), www.tinet.ita.doc.gov, almost all of whom will travel by air. And in the jet era, not only traditional ports of entry like New York and San

Francisco, but inland cities like Atlanta and Denver, have become international gateways; moreover, under the expansive definition of an "international" flight under the Convention, a through ticket to any point in the United States that originates or passes through a foreign country is subject to the Convention, even if the relevant leg of the journey is a wholly domestic flight.

Also implicated is fairness as between international and domestic passengers. Again because of the expansive definition of an "international" flight under the Convention, oftentimes one passenger will be caught by the restrictions of the Convention when another passenger on the same plane is not. The Detroit-to-Philadelphia flight in this very case was a domestic flight in every real sense. Yet because they happened to be traveling on a through ticket originating in Canada, the Grimeses came under the Convention — while a passenger in the adjacent seat subjected to the same treatment could have had full redress under state law.

National — indeed, international — uniformity and clarity in the handling of claims under the Convention, both for "accidents" under Article 17 and for "willful misconduct" under Article 25, is thus a matter of major public importance.

B. The Decision Below Misperceives This Court's Decision and Admonitions in *Air France* v. *Saks*, 470 U.S. 392 (1985), and Is Inconsistent With a Recent Dictum of This Court and With a Decision of the Eleventh Circuit.

In *Air France* v. *Saks*, 470 U.S. 392, 405 (1985), this Court defined an "accident" under Article 17 as "an unexpected or unusual event or happening that is external to the passenger." Of cardinal importance was

what the Court said about the application of its definition. "This definition," it said, "should be *flexibly applied* after assessment of *all the circumstances* surrounding a passenger's injuries." 470 U.S. at 404-405 (emphasis added). "[W]e require only that the passenger be able to prove that *some link in the chain* was an unusual or unexpected event external to the passenger." 470 U.S. at 406 (emphasis added). And "[i]n cases where there is contradictory evidence, it is for the *trier of fact to determine* whether an 'accident' as here defined caused the passenger's injuries." 470 U.S. at 405 (emphasis added).

The Second Circuit noted very recently that "courts have wrestled with the *Saks* definition of 'accident' since it was announced." *Wallace* v. *Korean Air*, 2000 WL 730385 at *5 (2d Cir. June 6, 2000). This case affords an opportunity to clarify matters.

Such an opportunity seemed to be afforded last year in *El Al*, *supra*, but was frustrated by stipulations of the parties when the case reached this Court. That was an action by a passenger who claimed to have been subjected to an improper physical search. Directly relevant to the present case was the question, considered by both the district court and the Second Circuit, whether the search of the passenger was an "accident." The district court had held that it was, expressly "[u]sing the flexible application prescribed by the Supreme Court" in *Saks*, 119 S. Ct. at 670 n.9, and concluding: "[A] routine search applied erroneously to plaintiff in the course of embarking on the aircraft, is fairly accurately characterized as an accident." *Ibid.* But the Second Circuit disagreed. Rather than "assess[ing] all the circumstances surrounding [the] passenger's injuries," as instructed by *Saks*, and analyzing the event

by its constituent elements, it addressed only the event's overall category — and at a high level of abstraction. Security searches, it said, are "routine." "The risk of mistakes, *i.e.*, that innocent persons will be erroneously searched," is "[i]nherent in any effort to detect malefactors." Therefore, it reasoned, what the passenger had been subjected to was not "an unexpected or unusual event" but "ordinary events and procedures of air travel." *Ibid.*

This Court clearly regarded the Second Circuit's approach as faulty. "It is questionable," said Justice Ginsburg for the Court, "whether the Court of Appeals 'flexibly applied' the definition of 'accident' we set forth in *Saks*." *Ibid.* But the opportunity to clarify the application of *Saks* was forestalled in *El Al* by the fact that the plaintiff chose to stipulate in this Court that the matter in suit had not been an "accident" within the meaning of Article 17. 119 S. Ct. at 667, 670 n.9.[4]

That opportunity is presented now. The court below performed essentially the same high-level abstraction as did the Second Circuit in *El Al*. Rather than "assess[ing] all the circumstances surrounding a passenger's injuries," as directed by *Saks*, and "flexibly" analyzing the event sued on in that light to ascertain whether "some link in the chain was an unusual or unexpected event external to the passenger," it simply declared (evidently as a matter of judicial notice, and in direct contradiction to the evidence) that the general categories "confusion over seat assignments" and "removal of bumptious [*sic*]

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[4] This left as the issue before this Court the question whether "a passenger whose injury is not compensable under the Convention (because it entails no 'bodily injury' or was not the result of an 'accident')" has any recourse to an alternate remedy; the Court answered in the negative. 119 S. Ct. at 668.

passengers" was "hardly unexpected or unusual," without even addressing testimony as to the demeanor of the passenger, the behavior of Leone, the brutality of the police, or any connection between the two; just as the Second Circuit in *El Al* simply declared the general category of "security searches" to be "routine," and shrugged off the wrongful behavior of the airline in the specific case of its security search of the plaintiff there, on the ground that "mistakes" will happen.

As the Court implicitly recognized in *El Al*, this approach makes a mockery of the guidelines so carefully laid down in *Saks*. Almost any event can be subsumed under some general "routine" category at a high level of abstraction and shrugged off with "mistakes will happen." As but one example, it is "routine" to serve alcoholic beverages in flight, and mistakes may happen and somebody be served too much; but injury caused by such a drunken passenger is caused by an "accident" for Article 17 purposes. *Langadinos* v. *American Airlines, Inc.*, 199 F.3d 68 (1st Cir. 2000); *Oliver* v. *Scandinavian Airlines System*, 17 CCH AV. CAS. 18,283 (Md. 1983), cited with approval in *Saks*, 470 U.S. at 405.

At least two other courts of appeal have taken a view more in harmony with *Saks*. The Eleventh Circuit, in *Krys* v. *Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998), was explicit that the proper approach is not to look at some high-level overarching generalization such as, in that case, "crew negligence," but rather to analyze the "purely factual description of the events" giving rise to the action, "asking what precise event or events allegedly caused the damage sustained by the plaintiff." *Id.* at 1521-22 and n.10. Here, the "precise event" was not

some vague "dispute over seat assignments," but the brutal ejection of plaintiff not only from the seat which he had been assigned and to which he had been directed, but from the airplane itself. In a very recent case, the Second Circuit — having evidently taken to heart this Court's observations as to its treatment of the "accident" issue in *El Al* — similarly engaged in a detailed analysis of the facts in determining that the sexual groping of a female passenger by a male passenger, without interference by the airline crew, was an Article 17 "accident." *Wallace* v. *Korean Air*, 2000 WL 730385 at *6-*7 (June 6, 2000).

Finally, over and above these broadly applicable considerations, in this case the court below failed to observe the *Saks* admonition that "[i]n cases where there is contradictory evidence, it is for the trier of fact to determine whether an 'accident' as here defined caused the passenger's injuries." 470 U.S. at 405. It is impossible to square with this admonition the *ipse dixit* of the court below that the cause of petitioners' injuries was "hardly unexpected or unusual," when the testimony of two experienced flight attendants and the veteran captain of the aircraft was directly to the contrary. It is impossible to square with this admonition the reference by the court below to "bumptious passengers," when the very arresting detective sergeant himself testified that Grimes's demeanor was "matter of fact."

C. The Decision Below Rests on a Principle of Treaty Construction Which This Court Has Condemned.

Likewise of broad general importance is the interrelationship between determination of an "accident" under Article 17 and "willful misconduct" under Article

25. The court below, as noted, held that Article 25, in its form applicable to the present case, "merely removes the limits on recovery created by other provisions of the Convention" — *i.e.*, the cap on quantum of damages in Article 22[5] — so that "[o]nly after one establishes that an accident occurred can one attempt to demonstrate that the accident came about as a result of willful misconduct, in which case one can benefit from the provisions of Article 25." 4a n.3.

The implications of this interpretation are grotesque. Under it, for example, an airline that willfully inflicted bodily injury on its passengers as a matter of routine would escape liability, because there would be no "accident" since the behavior was not "unexpected or unusual." An airline could willfully defame passengers or otherwise inflict mental or emotional injury on them with impunity, because there is no liability for such injury in the case of "accidents" under Article 17.

But that is not what the applicable version of Article 25 *says*. It says that in cases of willful misconduct, "[t]he carrier shall not be entitled to avail himself of the provisions of this convention which [a] exclude ***or*** [b]

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[5] Article 22 sets an upper limit on the quantum of a carrier's liability. In the Convention itself, this limit is 125,000 gold francs. Carriers have voluntarily waived this limit in part or in whole and subject to certain conditions, by the so-called "Montreal Agreement" (not to be confused with "Montreal Protocol No. 4"), Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, approved by Order E-23680, May 13, 1966, 31 FED. REG. 7302 (1966), note following 49 U.S.C.App. § 1502; 14 C.F.R. § 203.4, and the IATA Intercarrier Agreement on Passenger Liability (1995), to be implemented pursuant to the IATA Agreement on Measures to Implement the IATA Intercarrier Agreement (1996). *See* Thomas J. Whalen, *Update on the IATA Intercarrier Agreement*, 13-Fall AIR & SPACE LAW. 1 (1998).

limit his liability." (Emphasis and "[a]" and "[b]" added.) The court below read this as if the words "exclude or" did not appear. But the language is absolutely plain. If there is no "accident" or bodily injury, under *Saks* and *El Al* the Convention *excludes* liability. But under Article 25, the carrier cannot take advantage of this exclusion in the event of willful misconduct; the exclusion ceases to apply and the carrier's liability is governed by state law. If there is an "accident," Article 22 sets a quantum *limit* on liability. But under Article 25, the carrier cannot take advantage of this limit in the event of willful misconduct; Article 22 ceases to apply and the carrier's liability is unlimited. That is the indisputable plain meaning of these words. There is no ambiguity whatever in them.

The court below made no independent analysis and simply relied on two older cases for the proposition that Article 25 does not mean what it says. *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475 (D.C. Cir. 1991); *Floyd* v. *Eastern Airlines*, 872 F.2d 1462 (11th Cir. 1989), *rev'd on other grounds*, 499 U.S. 530 (1991). Both these cases relied on negotiating materials and drafting history. 932 F.2d at 1484-90; 872 F.2d at 1483-89. Whatever may be the principles of treaty construction where there is ambiguity (such as in determining the meaning of "accident" or "willful misconduct," or of some technical French law term in the original French of the Convention), there is no room for resort to such materials to gloss unambiguous language. *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989) ("We must thus be governed by the text — solemnly adopted by the governments of many separate nations — whatever conclusions might be drawn from the intricate drafting history . . . .").

Like the Article 17 issue, this Article 25 issue was present in *El Al* but this Court did not rule on it because the passenger failed to preserve it. *119 S. Ct. at 670 and* n.10. Justice Stevens made it vigorously clear in his dissent in *El Al* that under Article 25, "[t]he Convention . . . does not preempt local law in cases arising out of 'willful misconduct,'" 119 S. Ct. at 676, and that "accident cases . . . preempt local law, [while] willful cases . . . do not." *Id.* at 677. (His dissent was not as to this point but as to preemption of local law in the "narrow sliver of incidents that arise neither from an accident nor willful misconduct." *Id.* at 676 (footnote omitted).

Like the question of defining an "accident," the question of the relationship between Article 17 and Article 25 is a matter of great public importance affecting millions of travelers nationwide. (Its significance is not diminished by the fact that for cases arising since March 4, 1999, Montreal Protocol No. 4 has amended Article 25 to deal expressly only with the cap on damages.)

CONCLUSION

In view of the public importance of the issues, calling for uniformity of treatment of millions of travelers, and fairness as between domestic and international passengers; the court below's misperception of this Court's *Saks* decision; the lower courts' "wrestl[ing] with the *Saks* definition of 'accident' since it was announced," *Wallace*, *supra*; and the conflict among circuits, the petition for certiorari should be granted.

Respectfully submitted,

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